UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

DRESSER-RAND COMPANY

and

LOCAL 313, IUE-CWA, AFL-CIO

Cases 3-CA-27141
3-CA-27260

RESPONDENT'S BRIEF IN SUPPORT OF ITS CROSS-EXCEPTIONS -AND- IN OPPOSITION TO THE CHARGING PARTY'S EXCEPTIONS

Respondent Requests Oral Argument

Respectfully submitted,

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PRELIMINARY STATEMENT

Mr. Painter carefully set the scene. He picked a day. He collected his materials. He poured the kerosene, dropped his lit zippo on the fuel, and walked away. His actions touched off a fire that lead to an explosion; only instead of destroying Dresser-Rand's physical plant and machinery, it was the Company's corporate reputation with investors and its financial business prospects as reported by prominent market analysts that were sabotaged. Instead of fire, Mr. Painter used incendiary words designed to hurt his employer's standing in the market. The ALJ rightly determined that the Company was entitled to suspend and terminate him for these actions.

As investigators of the aftermath, Company officials had to simultaneously put out the fire, rebuild their reputation, investigate the cause and remove any and all arsonists from its ranks. It was no simple task. As the ALJ noted in the opening to his decision, this case raised "a number of novel and interesting issues involving interpretation of the Act and the Board's precedents." (ALJ p. 2). The Company drafted interview questions that were designed to determine both what happened, who was involved and whether it was part of a larger plan that would continue to unfold. Knowledge of all of these elements was necessary in order to determine how to respond appropriately to protect the Company's interest and in compliance with the National Labor Relations Act. It is not a mistake that the interviewers were instructed in writing in the text of the questions to "[g]et full explanation, but make clear we are not interested in hearing about union negotiation strategy – just plans made to communicate this news to third parties." Respectfully, the ALJ erred in determining that

the Company "went beyond the permissible bounds by widening the scope of its inquiry to include prohibited topics." (ALJ p. 38, l. 17-20).

Furthermore, in concluding what caused the "explosion," no one act can be taken in isolation; however that is exactly what the ALJ did in concluding that certain of Mr. Painter's statements were protected under the Act. The ALJ erred in finding that not every portion of Mr. Painter's speech was unprotected. He also erred in finding that Mr. Painter's actions were "concerted," as the Respondent clearly proved that his only true motivation was to strike back and harm the Company – not to achieve any specific concession at the bargaining table. The ALJ came to the only correct result in this case, but along the way, respectfully, some of his reasoning was wrong. To the extent the Board is already reviewing portions of Mr. Painter's speech with regard to the Charging Party's exceptions, the Respondent takes exception in order to place all of Mr. Painter's speech in the record for review so that a determination can be made that Mr. Painter's entire speech was unprotected and his termination justified.

The Respondent urges the Board to vacate that portion of the ALJ's decision which found the Company unlawfully interrogated its employees. The Respondent also requests that in reviewing the ALJ's decision with regard to the termination of Mr. Painter, the Board review the entire record of Mr. Painter's statements, find them all unprotected by the Act, and reject the Charging Party's exceptions.[1]

STATEMENT OF THE CASE

[1] No party has taken exceptions with regard to the ALJ's findings that the Company did not violate any employees' *Weingarten* rights; that the Company's Insider Trading and fair Disclosures Policies are not violative of the Act; and that the Company did not unlawfully threaten reprisals for violations of these policies. As no exceptions as to these matters have been filed, any objection to these findings are now waived, and these aspects of the ALJ's ruling shall stand. Rule 102.48(a).

A. Procedural Posture.

Respondent Dresser-Rand Company ("Respondent" or the "Company" or "D-R") hereby respectfully files its brief in support of cross-exceptions to certain rulings in the decision of Administrative Law Judge Paul Buxbaum (the "ALJ") and in opposition to the exceptions filed by IUE-CWA, Local 313, ALF-CIO ("Charging Party" or "Union" or "Local 313") in the above-referenced matter in accordance with Section 102.46(b), (c) and (e) of the Rules and Regulations of the National Labor Relations Board ("NLRB").[2] The hearing in this case was held in Elmira, New York on August 2, 3, 4, 5 and Corning, New York on October 20, 21 and 22, 2010. All parties participated in the proceeding, including the Company, the Union and Counsel for the acting General Counsel of the National Labor Relations Board, Region 3 ("General Counsel"). Thereafter the parties submitted post-hearing briefs. The ALJ rendered his decision on February 18, 2011, dismissing all charges against the Respondent except for a single 8(a)(1) charge, finding the Respondent violated the Act by coercively interrogating employees. The Charging Party filed exceptions dated April 1, 2011. The General Counsel filed no exceptions. On April 8, 2011, the Associate Executive Secretary extended Respondent's time to file an answering brief and cross-exceptions through and including April 29, 2011.

In the Complaint against the Respondent heard before ALJ Buxbaum, the Acting General Counsel alleged that the Respondent conducted several unlawful interrogations of employees, unlawfully denied some of those employees' requests for representation by certain officials of the Union at these investigatory interviews, and unlawfully

[2] By letter dated April 29, 2011 the Executive Secretary granted Respondent permission to file a combined brief.

suspended and discharged its employee, Glenn Painter for engaging in protected speech; promulgated, maintained, and enforced certain unlawful work rules and issued a threat of punishment against its employees if they violated those rules in violation of Section 8(a)(1) and (3) of the Act. (ALJ p. 1).[3]

The ALJ concluded that the General Counsel failed to demonstrate that the Employer violated the Act in any way, other than certain of its questions constituted unlawful interrogation of employees about protected activity. (ALJ p. 2). While the ALJ refused to find that each and every component of Mr. Painter's speech was unprotected, he concluded that "[c]onsidering the entire transcript of Painter's statements to the financial analysts, I conclude that Painter went beyond the boundaries of the protections afforded to employees by Section 7." (ALJ p. 34 l. 43-5). The ALJ then held that "[b]ecause Painter engaged in conduct… that was not protected, his Employer was legally privileged to suspend and discharge him for it." (ALJ p. 46 L. 10-2). The Charging Party has excepted to the findings regarding Mr. Painter's suspension and discharge. Respondent has no objection to the ALJ's ultimate finding that Mr. Painter's speech was unprotected and his termination justified. However, because the termination, and the protected / unprotected nature of Mr. Painter's speech is currently the subject of the Charging Party's exceptions, and because portions of Mr. Painter's speech will be the subject of review, the Company excepts to the ALJ's conclusions that certain of Mr. Painter's statements were protected in order to place the entire contents

[3] References to the Administrative Law Judge's decision are referenced by "ALJ p. __" followed by the number. References to the hearing transcript are indicated by "Tr." and the number in parenthesis (Tr. page: line). References to the General Counsel's exhibits are indicated "GC-__"'; references to the Respondent's exhibits are indicated "R-__". References to the Respondent's Exceptions are "R.E. __"; references to the Charging Party's Exceptions are "C.P.E.__".

of his speech on the record for review. Respondent continues to contend that each and every portion of Mr. Painter's statement was unprotected by the Act and respectfully requests the Board to agree.

Regarding the investigation into Mr. Painter's statements, the ALJ had the benefit of the script that was utilized during witness interviews. He found that while most of the interrogation was lawful, "in its zeal to learn as much as possible about the events at issue, the Employer went beyond the permissible bounds by widening the scope of its inquiry to include prohibited topics." (ALJ p. 38 l. 16-9; ALJ p. 57). As a remedy, the ALJ ordered the Respondent to cease and desist and post a notice. (ALJ p. 57 l. 15-20). The Respondent excepts to the conclusions of law that undergird this portion of the decision and requests that the Board vacate that portion of the ALJ's decision only.

B. Background.

Dresser-Rand is a public Company incorporated in the state of Delaware with corporate headquarters in Houston, Texas. (ALJ p. 2). D-R manufactures heavy equipment used in the oil and gas industry. (ALJ p.2). In addition to manufacturing, D-R generates approximately half its revenue by servicing the equipment it sells, in the so-called "aftermarket." (ALJ p.2). D-R has twelve manufacturing facilities worldwide and four in the United States. Of D-R's United States facilities, the three located in New York State (Painted Post, Olean and Wellsville) are involved in some respects in this case. (ALJ p. 3).

The Company went public in August 2005 and is traded on the New York Stock Exchange, under the "DRC" symbol. (ALJ p.2). Because D-R services the oil and gas industry, its stock is tracked relative to the Philadelphia Oil Services Index ("OSX")

comprised of 15 leading oil industry companies. (ALJ p.12). As expected, D-R stock, on most days, trades fairly consistently in comparison with the OSX index. (ALJ p. 12). As a publicly traded Company, D-R news and developments are covered in the financial industry by a number of independent sell-side analysts who research and report on D-R to the rest of the investment community (the "analysts"). (ALJ p. 3). Investors rely heavily on information provided by the analysts in determining whether to buy, sell or hold D-R stock. (ALJ p.3 n.6). These analysts are listed on D-R's website. (ALJ p.3). In April 2009, twelve such analysts covered the Company. (ALJ p.3).

With regard to the new units D-R manufactures, it takes approximately 12-15 months from order to delivery. (Tr. 640). During 2008, D-R had record bookings (placement of orders for new products). (Tr. 640). This created so much work for D-R that it ended 2008 with a record backlog of orders that would provide work through 2009 and profit through 2010 despite the economic downturn that began in 2008. (ALJ 12, Tr. 641). D-R has structured its business uniquely in order to weather such downturns. (Tr. 641-2).

Back in 2000, after experiencing a downturn and drop in bookings, the Company was forced to engage in a major restructuring of its workforce. (Tr. 642). In order to avoid the disruption and adverse consequences of such a major restructuring in the future, the Company implemented what it refers to as its "flexible manufacturing model." (Tr. 642, 646). Pursuant to the flexible manufacturing model, D-R subcontracts a certain percentage of its work when it is busy; however, when orders slow, D-R is able to adjust the percentage of work that is outsourced and redirect it back to its own plant and employees. (Tr. 646). The subcontracting efforts serve as a "shock-absorber" so

that as orders fall, the Company can avoid major workforce restructuring. (Tr. 646). The Company was able to implement this approach in 2009, and, in fact, ended 2009 with record sales and earnings. (Tr. 647). This flexible manufacturing model has been explained to the investment community as a key to the Company's success. (Tr. 646-647).

C. Painted Post Labor Negotiations.

Since July of 2007, before the economic downturn in 2008, and until September of 2009, the Company was in contract negotiations with Local 313 at Painted Post. (ALJ 3). The contract expired on or about August 3, 2007. (ALJ 3). Negotiations were unsuccessful and a strike ensued on or about August 4, 2007. (ALJ 3). After employees offered to return to work, a lock-out followed which lasted for approximately a week in November 2007. (ALJ 3). Negotiations continued to be unsuccessful, and the Company implemented its final offer at the end of November 2007. (ALJ 3). Most employees returned to work thereafter. (ALJ 4). Negotiations finally concluded with a new contract settled in September and ratified in November 2009. (ALJ 4). In total, the negotiations lasted approximately twenty-seven months. (ALJ 4; R-6).

Two sets of negotiation sessions occurred in April of 2009; one in early April (7th-8th) and another in late April (28th-29th). (ALJ 9). During the April 28th negotiations, the Company withdrew its pre-recession economic proposal, and made new proposals on a few non-economic items including one that was intended to directly address Painter's work, i.e. eliminating paid time off for union business for the chief stewards and the benefit specialist. (ALJ p.9). The Company also raised the possibility of a future layoff of approximately 23 employees or instituting a shared workweek for a portion of the

facility. (ALJ p.10). Negotiations ended on April 28th at about 8:00 p.m. (ALJ p.10). Immediately thereafter on that evening, the Union distributed the Company's revised offer, with a cover memo to all employees. (ALJ p.10). The memo was critical of the Company's position and accused the Company of seeking to avoid reaching an agreement:

> "On April 9, 2009, your Union Negotiating Committee presented the company with a comprehensive proposal in an attempt to reach an agreement.
> Today, April 28th, the company presented to the Union Negotiating Committee a revised offer. As you can see, the company has made a drastic step backward. The company also proposed a 32 hour workweek during the summer to save 23 jobs while still demanding 40 hours of mandatory overtime.
> Make Sense??
> The company has no interest in reaching an agreement."

(ALJ p.10; GC-3). Negotiations were set to resume at 9:00 or 10:00 a.m. the next morning. (ALJ p. 11). It was in the evening of April 28, 2009, sometime after 8:00 p.m., that Painter, a frustrated employee of the Company and Chief Union Shop Steward and member of the Union Negotiating Committee, tells us he went home, wrote his script and made 12 calls to the analysts. (ALJ p. 10-11).

D. April 29, 2009: Houston, Texas.

On April 29, 2009, D-R was in the midst of planning to release its quarterly earnings report and concurrently hold its earnings conference call on April 30, 2009. (ALJ 12). On the morning of April 29, 2009, instead of finalizing details of the release and the call, the Company's Director of Investor Relations, Blaise Derrico ("Derrico") arrived at work to hear a number of alarming voice-mails from the analysts regarding negative information they had received the night before concerning the amount of work

in two, major New York plants of the Company and the current status of labor relations in two of the Company's facilities. (ALJ 12). As the stock market opened, D-R stock varied precipitously from the OSX and the Down Jones Industrial Average ("DJIA"). (ALJ 12).

One of the analysts sent Company officials in Houston a copy of the voice-mail he received on the evening of April 28th. (ALJ 12). It went as follows:

- This is a representative of Union Employees working at the Dresser-Rand Company.
- Negotiations between Dresser-Rand and Local 313 at the Painted Post operations took a turn for the worse April 28th.
- The workload and backlog at Painted Post has fallen off dramatically and the Company has proposed a possible 32-hour workweek.
- Negotiations are forthcoming at Dresser-Rand Wellsville operations and it's not looking good at this time that an agreement will be reached by August 15th 2009.
- Olean's work has also dropped off by 50%.
- Mr. Volpe[4] stated in his year end conference call that employment levels would be maintained.

(ALJ 11; GC-23, GC-8).

The Company contacted the New York Stock Exchange ("NYSE") in order to receive permission to issue a news release to correct the misstatements set forth in the voice-mail left for one of the analysts that the Company heard. (ALJ 12).[5] At 10:44 am, the Company issued its first press release to accurately update the general public on the status of negotiations at Painted Post. (ALJ 12). This release had no effect on the otherwise unexplainable trading variances as compared to the OSX and the DJIA (ALJ

[4] Vincent Volpe, D-R's Chief Executive Officer. (ALJ 4).

[5] The NYSE regulates how and when the companies it lists issue press releases during the hours of trading (Tr. 650:15-21; 651:17-25).

12; Tr. 652-4; R-5), prompting the Company to seek another unusual request from the stock exchange: that it be allowed to send another press release, this time releasing the favorable earnings report previously scheduled for release on April 30th, 2009, a day early. (ALJ 12; Tr. 654-7; R-9). The NYSE approved the news release, but only on the highly unusual condition that trading in D-R stock be temporarily suspended to allow the market to digest the information. (ALJ p. 12; Tr. 655, 658, R-5). Trading in D-R stock was suspended until just before 3:00 p.m. (ALJ p. 12; Tr. 655:16-25; 659:8-12; R-5).[6]

Over the course of April 29, 2009, trading volume in D-R stock was approximately 5.4 million shares. (ALJ 12; Tr. 663).[7] That was the third highest trading day in volume in D-R history -- outpaced only by the Company's initial public offering and a subsequent secondary offering of shares. (ALJ 12, n. 20). The average, daily trading volume in D-R stock is approximately a little over a million shares. (ALJ 12). The pronounced variance in Company stock as compared to the very stable OSX and DJIA and the virtually unprecedented trading volume leaves no doubt that Painter's actions influenced the market in Dresser-Rand stock on that date. (ALJ 52 l. 20-22 "the evidence shows that Painter's comments had a brief, but dramatic effect on the

[6] The press release indicated that D-R's 2009 first quarter net income was $34.5 million, an increase of 26.8% over the first quarter of 2008, matching analysts' expectations. (R-9). The Company also indicated in the release that it had come to its attention earlier that day that a representative of Local 313 had contacted several investment analysts with "misrepresentations regarding" Painted Post as well as other facilities. (R-9). Trading then resumed. Respondent's Exhibit 5, shows performance of Company stock as compared to the OSX for the date in question with OSX performance in green, DJI performance in red and Company stock in blue. The graph at the bottom of the chart shows the trading volume, including the suspension of trading until 2:58 p.m. (R-5).

[7] The ALJ's decision cites 4.5 million shares but the transcript and the exhibit demonstrates it was 5.4 million.

Company's stock price;" ALJ 13; Tr. 662).[8] There simply is no other explanation for D-R stock activity for that day. (ALJ 12-13, 52, Tr. 662-3).

E. April 29, 2009: Painted Post, New York.

On April 29, 2009, negotiations were scheduled to resume at around 9 am. (ALJ p. 11, l. 35). The Company caucus began at 7:00 a.m. (ALJ 13). Around 8:00 am, word got to the Company's negotiation committee in Painted Post from Company officials in Houston that someone had provided false information about the Company to investment analysts the night before and Company officials in Houston were working on responding to the situation. (ALJ. 13). The Company negotiating team, involved that morning in assisting Company officials in addressing the situation, finally walked into the negotiations with the Union around noon. (ALJ 13).

Painter, along with the other members of the Union Committee, waited in the negotiation room for the Company team to arrive for some three hours. (ALJ 11, l. 35). During those three hours -- an unexpected wait for the Company to come to the table -- Painter never mentioned to his fellow committee members that he made 12 phone calls to analysts the previous evening. (ALJ 11). Despite Painter admitting that what he had

[8] Professor Donald Langevoort, a securities law professor at Georgetown University Law Center and the Company's SEC law expert at the hearing in this matter, testified that in his experience, "when the price moves in that 90 second to the first few minutes for a big company, that's being driven by the buy and sell side analysts whose job it is to be watching and to know within a few seconds that something has come up." (Tr. 1021). Professor Langevoort is a former Special Counsel in the Office of the General Counsel at the United States Securities & Exchange Commission in Washington; is the co-author of a widely adopted casebook, *Securities Regulation: Cases and Materials*; and has testified several times before Congress during legislative deliberations on securities law and litigation reform. Professor Langevoort's full curriculum vitae can be found at R-18.

done was a significant event, he kept it to himself. (ALJ 11). In fact, when asked at the hearing why he did not tell his fellow bargaining team members, he had no explanation:

> Painter: I – I just didn't. It wasn't a topic of discussion. We were preparing the company to come in [sic]. There was talks about the revised proposal and that, but no, I did not discuss that with them.
>
> Question: You didn't think it was important for them to know about it?
>
> Painter: We were preparing for that day, so no, we – I did not discuss it with them. Whether it was important to them or not, I really didn't think about it at the time.
>
> ***
>
> Question: Your position is that you had done something good for the union the night before, correct?
>
> Painter: I – I had employed a strategy, yes.
>
> Question: Employed a strategy on behalf of the union?
>
> Painter: Yes I did.
>
> Question: And it was designed to help reach an agreement?
>
> Painter: Yes.
>
> Question: Pressure on the company?
>
> Painter: Yes.
>
> Question: And you hadn't – your – your state of mind was that you hadn't done anything wrong whatsoever, correct?
>
> Painter: Yes.
>
> Question: Had not violated any company policy?
>
> Painter: Not to my knowledge, no.
>
> **Question: And yet, you didn't tell anyone in that room what you had done on their behalf?**
>
> **Painter: Not at that time, no.**

(ALJ 11; Tr. 407 - 409) (emphasis added).

When the Company's team finally arrived, the team, through its spokesperson, floated what had happened the evening before to the Union bargaining team in an effort to determine whether the information came from them. (ALJ 13, l. 15-20). No one responded, not even Painter, despite the fact he knew exactly what the Company was referencing. (ALJ 13, l. 29-30). Negotiations that day ended after approximately half an hour so the Company representatives could return to assisting Houston officials with correcting the negative impact the calls were having on the Company stock price. (ALJ 13). Still, even after the Company left the table, Painter did not reveal, even to the Union, what he had done despite his insistence that he thought he had done a good thing: "I don't know exactly why not, to be honest with you. I just – it wasn't a topic of discussion at that time." (ALJ 14, l. 18). In fact, Painter would not be truthful and forthright with respect to what he had done until his second investigatory interview with the Company on April 30, 2009. (ALJ 17, 18).

After negotiations ended for the day on April 29, 2009 and the negotiating team returned to the caucus room, they were able to hear the voice-mail one of the analysts had received. (ALJ 13, l. 40-45). Company officials immediately realized it was Painter's voice in the voice message. (ALJ 13, l. 40-45). Even after hearing the recording on April 29, 2009, Company officials were unsure of the magnitude of the situation they were dealing with. They knew, for example, that someone on the negotiating committee had knowledge of what happened, however, the D-R officials were unsure whether it was a "solo act." (ALJ 13, l. 44). They had no idea: (i) how many analysts were called; (ii) if the same person called all of the analysts; (iii) what

was told to the other analysts by Painter or anyone else who may have made a call or calls; (iv) who on Wall Street, or elsewhere, was called; and (v) if this activity was merely one piece of a multi-part plan to unlawfully damage the Company. (ALJ 13-14; Tr. 783-4).

F. The Company's Investigation.

The Company decided to initiate an investigation, interviewing witnesses separately before they could get their stories "straight." (ALJ 13-14). The investigation began on April 30, 2009. (ALJ 14). A series of questions was created and a schedule of employee interviews was made up, each with a corresponding interviewer and note-taker. (ALJ 14, Tr. 784, 831). During the interviews, every investigator read from a pre-prepared script. (ALJ 14; GC-32 – GC-42).[9]

The script contained the following statements, questions and directions (in bold) to the interviewers which demonstrate that the employer took pains to limit its interview to not tread on internal union matters:

- We are here to ask you some questions regarding the recent disclosures to securities analysts of misleading information relating to the Company made by a person who said he was a representative of our employees.

***

- After the Company communicated these changes to the Union, what did the members of the negotiating committee say / do with respect to communicating this news to non-member third parties? **Get full explanation, but make clear we are not interested in hearing about union negotiation strategy – just plans made to communicate this news to third parties.**

During Painter's initial interview, he lied by denying any involvement or knowledge of the Analyst calls. (ALJ 17, 18). In a later interview with a different

[9] Coates testified that he knew of no complaints arising from the interviews other than the choice of representative (Weingarten) issue. (Tr. 279-80).

investigator who intimated that the Company knew it was him and that he needed to "come clean," he finally admitted to making the statements to the analysts. (ALJ 18). Painter was suspended pending the outcome of the investigation. (ALJ 19, l. 9).

At the conclusion of the investigation, the Company terminated Painter's employment for violation of the Company's Code of Conduct. (ALJ 19, l. 30-35). The termination letter, and Meisner[10] by way of his testimony at the hearing, made clear that Painter was terminated for violating the Code of Conduct. (ALJ 19; GC Exh. 15). McDonnell[11] also made clear that, in addition, Painter's lying during the interview process was an egregious, aggravating factor supporting the termination decision and it was viewed as the "last straw." (Tr. 878; 880).

ADDITIONAL FACTS MAY APPEAR THROUGHOUT THE REMAINDER OF THE BRIEF.

[10] Daniel L. Meisner, the former HR manager at Painted Post and a factory manager at the time of the interview, was the interrogator in Painter's first investigatory interview and the note-taker in the second. (ALJ 4 l.14-15; ALJ 16 l. 18; ALJ 18).

[11] Daniel McDonnell is Human Resources Manager at D-R's Painted Post facility (ALJ 4, l. 14).

QUESTIONS PRESENTED

1. Does intentionally tipping investment analysts with false information, half-truths and reckless misstatements of a material nature, thereby damaging a Company in the eyes of its investors, when that employee acts on his own initiative, constitute concerted, protected activity? (Respondent's Exceptions # 1 – 15, Charging Party's Exceptions 1-16).
2. Does an employer have the right to perform a reasonable investigation when it does not know the extent to which union officials or others may be involved in a destructive act? (Respondent's Exceptions # 16-23).

ARGUMENT

A. WHILE THE ALJ'S ULTIMATE FINDING AS TO PAINTER'S STATEMENTS WAS CORRECT, THE ALJ ERRONEOUSLY FOUND HIS ACTIONS WERE CONCERTED AND FAILED TO FIND CERTAIN OF PAINTER'S STATEMENTS WERE UNPROTECTED BY THE ACT.

Painter's misleading and false statements to the analysts relating to (i) a 32-hour workweek (without limitation to the departments considered) in Painted Post, (ii) negotiations at Wellsville "not looking" good for an agreement by August 15, 2009, when no negotiations were even taking place at the time, (iii) a purported 50% workload drop off in Olean supported only by stale hearsay four times removed from purported speaker with no real firsthand knowledge regarding workload, and (iv) the implication that Volpe lied during investor conference calls about possible layoffs, were damaging to the Company's business reputation, were patently disloyal, violated Company Policy and were made with an intentional or reckless disregard for the truth. As the ALJ largely found, and as demonstrated below, Painter's conduct cannot be construed as

protected by the laudable purposes of Section 7, he cannot be reinstated[12] and ultimately his discharge must be sustained.

The Board may reject those findings which are contrary to the preponderance of the evidence. NLRB Rules and Regulations Sec.101.10(b)(1); 102.48(c).

1. The ALJ Erred In Finding Painter's Actions Were Concerted (Respondent's Exceptions #1 - 5).

Conduct must be concerted in order to be protected by Section 7 of the Act. The ALJ began with a correct recitation of the law. He stated that

> The key concept is that concerted action must 'be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.'" 268 NLRB at 497. The Board refined this a bit in *Meyers II,* observing that the Act 'requires some linkage to group action in order for conduct to be deemed 'concerted' within the meaning of Section 7.'

(ALJ 21). He went on to find, as Respondent proved at the hearing and in its post-hearing brief, that Painter acted alone, without authorization. (ALJ 21). This factor is not, however, dispositive, as the ALJ found. (ALJ 21). Yet, only in certain circumstances can unauthorized individual activity be "concerted." (ALJ 21).

Concerted activity encompasses some, but not all, individual activity. Meyers Industries ("Meyers II"), 281 NLRB 882, 885 (1986). "In general, to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees and not solely by and on behalf of the employee himself." Id. For individual activity to be concerted, it must "seek to initiate or to induce or to prepare for group action, …[or be] bringing **truly group complaints** to the attention of

[12] Section 10(c) of the Act prohibits the Board from ordering the reinstatement of any employee "if such individual was suspended or discharged for cause." 29 U.S.C. s 160(c).

management." Id. at 887 (emphasis added). With regard to "conversations," such as the one Painter engaged in with the Analysts, or rather their voicemail boxes, "a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees." Id. citing Vought Corp., 273 NLRB 1290, 1294 (1984), enfd. 788 F.2d 1378 (8th Cir. 1986).

(a) The ALJ Erred in Holding Painter's Telephone Calls Contained Sufficient Lineage to Group Action. (Respondent's Exceptions # 5).

Based upon the plain language of his statement, Painter's statement does not call anyone to any action, group or otherwise. It brings no complaint to the attention of management. The statements were made to third parties; however, no action on their part was requested – nor could they do anything to solve the attenuated labor dispute. Nothing about the situation surrounding Painter's statements satisfies the *Meyers II* requirements outlined above. (R.E. 5). Tellingly, Painter did not contact the Wall Street Journal — he contacted the analysts. He stated he wanted "Wall Street" – not the public – to know how the employees felt. (GC-21).

The ALJ incorrectly failed to recognize the significance of the persons to whom Painter was speaking. (R.E. 5). By contacting stock analysts and referencing "Wall Street," Painter was apparently evincing a concern for, if anyone beside himself, investors and potential investors — and not employees. Elsewhere in his opinion, the ALJ explicitly found this. (ALJ p. 34 l. 34- 40). In fact, Painter's misplaced concern is exactly like the unconcerted concern of the employees' for the viewing audience in Jefferson Standard, and is not protected. N.L.R.B. v. Local Union No. 1229, Intern.

Broth. of Elec. Workers "Jefferson Standard," 346 U.S. 464, 472 (1953). In that case the Board found, and the Supreme Court affirmed, that the employees' "ultimate purpose – to extract a concession from the employer with respect to the terms of their employment – was lawful. That purpose, however, was undisclosed; **the employees purported to speak as experts in the interest of consumers and the public at large**. They did not indicate that they sought to secure any benefit for themselves, as employees, by casting discredit upon their employer." Id. (emphasis added).

Similarly here, there is no request for help or assistance in Painter's script. Furthermore, it remains a mystery what kind of help the analysts could have provided. They are not the traditional audience (local public or media) that could assist or could publicize the dispute in a manner that would positively affect the employees or the negotiations. It is clear Painter wanted to harm the Company in the eyes of a very narrow part of the investing community and was willing to lie to get there. (Infra at Argument Section A(2)).

(b) The ALJ Erred in Finding Painter's Motives Were Mixed, Were on Behalf of His Co-Workers, or Were Intended to Reach a Contract Settlement. (Respondent's Exceptions # 1-5).

Moreover, the motives which the ALJ attributes to Painter - of reaching a contract or pressuring the Company to withdraw its proposal regarding his paid time off for union business– were undisclosed in his speech. (R.E. 2- 5). Contrary to the ALJ's findings, such a hidden motive does not demonstrate that activity is "concerted." Once again, Jefferson Standard is instructive:

> The only connection between the [speech at issue] and the labor controversy was an ultimate and undisclosed purpose or motive on the part of some of the sponsors that, by the hoped-for financial pressure, the attack might extract from the company some future concession. A disclosure of that motive might have lost more public support for the

> employees than it would have gained, for it would have given the handbill more the character of coercion than of collective bargaining.
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> [It was an attack] made by the company's technical experts upon the quality of the company's product. As such, it was as adequate a cause for the discharge of its sponsors as if the labor controversy had not been pending.

Not only were these supposed motives "undisclosed," the Respondent proved at the hearing that Mr. Painter's only true motivation was to harm the company. The Respondent also proved at the hearing, and in its post-hearing brief, that any alternative explanations for why Painter called the analysts were not true. The ALJ erred to the extent he found that Painter was motivated out of concern for his fellow stewards, or to pressure the Company into reaching an agreement. As demonstrated directly below, by reference to the evidence presented to the ALJ, Painter's statements were not concerted. (R.E. 1 – 6).

Painter not only acted alone, but out of his own interests. Painter admitted that he knew his activities were unauthorized, described them as "selfish actions" and "admitted he acted alone" and out of "frustration" in an e-mail apology he sent Union officials a few days later on May 2, 2009. (R-2, p. 183).[13] Contrary to the ALJ's finding that Painter's motivation was mixed (R.E. 1-6), Painter admitted that he acted out of self interest. Merely because Painter's explanation for why he made the calls varied, does not render his motivation mixed. In fact, the ALJ soundly rejected Painter's most

[13] "I apologize to you all for my selfish actions…I know that this caught you off guard…I acted out of frustration after Wednesday's negotiations session and I should have consulted with you before I acted out…I know I am not the spokesman for the Local or for the Negotiation Committee. I did cooperate with the Company's investigation…I admitted that I acted alone…I would like to make sure you know what I said. (R-2:183)."

fantastical, but consistent explanation – that he was trying to save the lives of his fellow employees. As the ALJ recited:

- "I am highly skeptical as to the sincerity of Painter's claim that he acted out of a desire to avert impending workplace violence by employees" (ALJ 22 l. 43)
- "he continued to assert that his primary reason for making the telephone calls was to prevent workplace violence" (ALJ 18 l. 30)
- "he emphatically contended that his primary consideration in undertaking this unilateral enterprise was to help prevent any incidents of workplace violence" (ALJ 31 l. 35)
- "Painter was totally unable to explain the relationship between his calls to the analysts and his supposed goal of preventing workplace violence;" (ALJ 32 l. 17)
- "His failure to include any reference to the potential for workplace violence is telling evidence that such concerns did not serve to motivate his conduct in any significant way" (ALJ 21 l. 33).

Despite having rejected Painter's primary stated motivation for making the calls, avoiding violence, and Painter's own admission that his actions were "selfish" the ALJ found other motivations that Painter either never testified to, or otherwise were shown to be untrue. (R.E. 1-5). Respectfully, this was in error.

The ALJ's finding that "it is entirely logical to infer that the loss of paid time on the part of its officers while they conducted union business posed a detriment to the functioning of the Union as a whole. I readily conclude that these factors also played a

part in Painter's thinking" (ALJ 22) is without citation to the record. (R.E. 2). So is the ALJ's conclusion that Painter acted out of concern for his co-workers Scouten and McNally. (ALJ p. 22, l. 21; 40-45) (R.E. 2, 3, 5). Painter admitted that his statements were about "an amount of work in the facilities" not any specific, or even general, working condition. (Tr. 426: 5-23). Furthermore, out of the various justifications Painter gave for his calls to the analysts, he (albeit incredulously) refused to admit that it was because of the proposal regarding paid time off for Union activities. (Tr. 469-471: 18-24). When asked "Did the proposal to eliminate the four -- up to four hours of union time for you, four hours a day, play any part in your decision to call the investment analysts that evening?" Painter answered: "No. My concern was getting an agreement. Q To avoid the violence? A Correct." (Tr. 471: 18-24). Thus, there is no evidence that Painter was concerned for how this proposal would affect either his co-workers or union business.

The ALJ erred when he credited Painter's "contention that he was motivated, in part, by a general desire to pressure the Company into reaching an agreement with the Union." (ALJ 22, l. 43-44). This conclusion is again unsupported by the testimony at the hearing. When pressed as to how the statements about D-R's other plants would help the contract status at Painted Post, Painter argued – without any personal knowledge – that the Company had similar objectives in negotiations at each plant. (Tr. 437-39). Painter could not explain further other than to say everything that happened at the New York plants was "related." (Tr. 441-42).

(c) The Employer Was Unaware Painter's Actions Were Concerted Based On Painter's Own Admissions. (Respondent's Exception 5).

Furthermore, under Meyers I, an additional requirement for the finding of a § 8(a)(1) violation is that "the employer knew of the concerted nature of the employee's activity." 268 N.L.R.B. at 497. There is no evidence that D-R knew of the allegedly concerted nature of Painter's actions. The only information the Company had at the time of Painter's suspension and discharge was Painter's admitted statement that he acted alone, after initially lying. No other union members admitted to knowing what Painter had done, or why, in their interviews.

Because Painter's actions were not concerted and because the Company was unaware that Painter would later claim that they somehow were (although that assertion is completely dubious), there is no proof of any concerted activity. Although the ALJ reached the right result in upholding the suspension and termination of Painter, his conclusion that Painter's activity was concerted was in error. (R.E. 1-6).

2. Painter's Statements Were Unprotected Because They Were Disloyal and/or Maliciously False. (Respondent's Exceptions 6-15 and Charging Party's Exceptions).

Even if the Board were to agree with the ALJ, and find Painter's actions were concerted, his statements were still unprotected because they were disloyal and in most cases maliciously false. (ALJ 21-22).

When an employee "attacks" his employer, whether or not he is engaged in "a concerted activity wholly or partly within the scope of" Section 7, the attack will deprive the employee of Section 7's protection if it constitutes "insubordination, disobedience or disloyalty," which, the Supreme Court has made clear, is "adequate cause for discharge." N.L.R.B. v. Local Union No. 1229, Int'l Bhd. of Elec. Workers "Jefferson Standard," 346 U.S. 464, 477-78 (1953); (ALJ 23).

Where concerted activity entails communications with a third party, such as here, such activity is protected if it meets a two-part test: (1) the communication indicates to the third party that it is related to an ongoing dispute between an employer and employees; and (2) the communication itself is not "so disloyal, reckless or maliciously untrue as to lose the Act's protection." In re Am. Golf Corp. (Mountain Shadows), 330 N.L.R.B. 1238, 1240 (2000), enforced sub nom. Jensen v. NLRB, 86 Fed.Appx. 305 (9th Cir.2004); accord, Endicott Interconnect Techs., Inc. v. NLRB, 453 F.3d 532, 537 (D.C. Cir. 2006).

An employee's statement loses the protections of the act when he speaks with deliberate falsity or maliciousness." In re Sprint/United Management Co., 339 NLRB 1012, 1017 (2003); (ALJ 36). This standard includes: "knowingly false' statements, statements made 'with reckless disregard for their truth or falsity,' 'malicious' statements and 'defamatory' statements." Id.

Turning to Painter's statement itself, there can be no doubt that the Company proved Painter's statements were a combination of lies, half-truths and reckless statements. The ALJ entirely agreed with the Respondent that Painter's first sentence was misleading to the listener. (ALJ 24 l. 40 "I find this introduction troubling on several levels."; l. 52-3 "Painter's unprecedented decision to proceed anonymously suggests a greater willingness to make statements that were malicious or reckless; ALJ 25 l. 1-32 "The content of the statement is consistent with the mindset that is prepared to engage in deceptive, reckless and malicious misconduct. In setting the stage for his communication to the analysts, Painter made false and misleading statements specifically designed to enhance the credibility of his assertions in an untruthful way").

(C.E. 1, 2, 3, 11, 12). The statements to follow were equally unprotected and must be read in light of this first statement, and as a whole.

(a) The ALJ erred when he found Painter's statements "[t]he workload and backlog at Painted Post had fallen off dramatically" and "[t]he company has proposed a possible 32 hour work week" was protected (R.E. 7, 8, 15).

The Company presented sufficient evidence that Painter knew or should have known that his statements about a 32-hour work week were false and that it was somehow the result of an overall lack of work across the facility was also false. He knew that the Company never made a proposal of a 32-hour workweek for all employees at Painted Post; in fact, the testimony was that merely 23 employees would be laid off unless a portion of the Company went to a reduced workweek some time in the future. (Tr. 222; 777). The Company had clarified in the negotiations, prior to Painter's misconduct, that only one section of the parts focus factory area of the plant would potentially have a reduced workweek. (Tr. 224:9-14). The Union's notice to all employees on the evening of April 28th indicates they were well aware of what was said. Painter testified that the entire factory would not be affected and that to identify the number of employees affected would only be an "estimate." (Tr. 321-22). Indeed, Painter admitted that he told a half-truth regarding the reduced workweek. (Tr. 327:4-7; 424).

Thus, the ALJ's ultimate finding that these statements did not forfeit protection is erroneous and confusing. (ALJ p. 26 l. 6-25). The ALJ describes Painter's statement as "exaggeration or puffery designed to make the employment situation at Painted Post look as bad as possible" (ALJ p. 26 l. 6-25) and "troubling that he failed to state that the management proposal for a reduced workweek did not involve any other plants." (ALJ p.

26 l. 6-25). Not only was Painter's statement false, within the meaning of the caselaw, it was also not related to any labor dispute. In re Sprint United Management Co., 339 NLRB 1012, 1019 (2003) (holding that employee repeating false rumors of anthrax attack unprotected, even though based on grain of truth); American Golf Corp., 330 NLRB 1238 (2000) (public, disparaging attack on the employer's product and policies with an undisclosed purpose of pressuring the employer during negotiations unprotected); TNT Logistics North America, Inc., 347 NLRB 568, 569 (2006) (employees' letter to employer's most important customer accusing employer of requesting employees to fraudulently record logbook times, unprotected as maliciously false); Endicott v. NLRB, 453 F.3d 532 (D.C. Cir. 2006) (finding employee's statements about layoffs leaving a void in workforce and that management would put the business "into the dirt" detrimentally disloyal communications, unprotected by NLRA). This is not the situation where a union employee is protesting a lack of work because the employer is unlawfully subcontracting work away from the bargaining unit, and the union employee is attempting to bring this practice to light in the press and community to put pressure on the employer. See e.g. Highland Superstores, Inc., 314 NLRB 146 (drivers were handbilling in support of union protest of company's announced plan to subcontract delivery in order to pressure the company to change its mind about subcontract; such handbiling is protected). See also. Valley Hosp. Med. Ctr., Inc., 351 NLRB 1250 (2007) (where employer and union were negotiating over staffing levels, union statement during press conference that as a result of understaffing nurses couldn't get medications to patients on time was related to specific ongoing dispute over staff ratios and designed to pressure employer into increasing staffing). Painter's

statements do nothing but imply that D-R's business is in trouble. Such statements which have no apparent connection to an issue in a labor dispute are unprotected. Endicott v. NLRB, 453 F.3d 532 (D.C. Cir. 2006).

In upholding Painter's suspension and discharge, the Board should do so on the further ground that these statements also are unprotected by the Act. (R.E. 7, 8, 15).

(b) The ALJ erred when he found Painter's statement "it's not looking good at this time than an agreement will be reached by August 15, 2009" about negotiations at Wellsville was protected (R.E. 9-11, 15).

The Respondent also proved that Painter knew or should have known that his statements about Wellsville were not true. On April 22, 2009, the president of the Wellsville Union allegedly told Coates that "things weren't looking good" regarding negotiations and that "the Company was after more language." (Tr. 178-9). Coates claims he related this to Painter. (Tr. 179:12). Painter testified that he believed "if the Company was to stand on the proposal that they had at that time [in Wellsville], that they would probably not come to an agreement." (Tr. 327:11-20). Regardless of what Painter believed, none of this was contained in what he told the analysts.

The Company proved that Painter's statement regarding the Wellsville negotiations was incorrect and untrue. (Tr. 602). Daniel Wallace, Director of Operations at Wellsville and former HR Director over all three of the Company's New York manufacturing plants, was the chief spokesperson for negotiations in Wellsville in 2008-2009. (Tr. 600). He testified that the parties in Wellsville participated in early negotiations from November 12 through November 26, 2008, some five months before Painter's statement to the analysts. (Tr. 601). The Union did not vote on the Company's final offer in those negotiations. (Tr. 601). By agreement of the parties, the

next negotiation did not occur until July, more than two months after Painter's statements to the analysts. (Tr. 602). Thereafter, the parties met and settled the contract in one month – the contract was ratified on August 15, 2009, with no gap between old and new. (Tr. 603) Furthermore, absolutely no labor dispute was associated with the contract negotiations in Wellsville. (Tr. 603). A truthful statement from Painter would have been, "While I am not involved in negotiations, I heard from someone else not involved in negotiations who heard something from someone who was involved in early negotiations that ended in November of 2008. The something was that if the Company maintains in August of 2009, the position rejected by the union in November of 2008, they probably will not reach agreement by August 15, 2009." That would have been the truth as Painter knew it or should have known it, but that is not what Painter said. He portrayed negotiations were not going well when there were **no negotiations**. He lied to the analysts and he knew it.

Thus, the ALJ erred in his ultimate finding that this statement did not forfeit protection of the Act. (ALJ p. 26 l.30 – p. 27 l. 35). The ALJ describes the basis for Painter's statement regarding Wellsville as "recklessly weak." Id. The case which the ALJ cites in support of his determination that this statement was protected, Valley Hospital Medical Center, 351 NLRB at 1252, citing Emarco, Inc., 284 NLRB 832, 833 (1987), clearly states that statements that are "disloyal" or "reckless" are unprotected. As such, the ALJ should have concluded that the statement was unprotected.

In upholding Painter's suspension and discharge, the Board should do so on the further ground that this statement also was unprotected by the Act. (R.E. 9, 10, 11, 15).

(c) The ALJ correctly found that Painter's statement "Olean's workload has also dropped off by 50%" was not protected (C.P. E. 2, 4-8, 10).

The ALJ correctly found that the Respondent proved that Painter's statements about Olean were false and recklessly made. (ALJ p. 27 -33). The ALJ rendered an exacting analysis of this short statement -- nearly six full pages of well-reasoned opinion.

First, the Respondent proved, and the ALJ rightly accepted, that Painter relied on a ridiculous chain of hearsay in making this statement about Olean. (ALJ 30). Coates testified that Painter got the information concerning the Olean plant from "Larry." (Tr. 269:15-25). Painter described Larry as Larry Dominski, a mentor of his who never worked at Olean and hadn't worked for D-R since 2003. (Tr. 428-30). It appears "Larry" was a former employee who left the Company under unfavorable terms (Tr. 428; 959). Painter claims to have relied on the statement delivered from Larry through Larry's hunting buddy's son, who is said to have worked in D-R's "after market." Painter is not sure whether the source, (Larry's hunting buddy's son) even worked at Olean or Wellsville and in what capacity. (430-31). Based on this convoluted communication, at least three times removed – son of hunting buddy to hunting buddy to Larry to Painter – Painter testified that he then "estimated" the 50% reduction in work volume at Olean, D-R's largest plant. (Tr. 329:22; 433). He stated this as fact to the analysts despite there being undisputed proof that neither the unknown source, nor any of the known sources, mentioned or knew of a 50% reduction in work. (329:15-25).

Painter added this piece of material information, 50% reduction in work plant-wide, because he said it sounded "similar" to the workload in Painted Post. (Tr. 329:15-25). The workload in Painted Post, however, was never off by 50%. The real reason

Painter said that half of the Company's work at Olean was gone was to get Wall Street's negative attention, and he succeeded.

The Olean information Painter relied upon was also stale and out of date. Painter gained this so-called information regarding Olean from Dominski in an e-mail dated October 20, 2008 – a full six months before the April 28, 2009, calls by Painter to the analysts. (Tr. 431; GC-24). Incredibly, Painter had the gall to falsely testify to the ALJ that the information was current and accurate (Tr. 429-30; 443). It was neither and he knew it.

Not only was the information about Olean out of date and known to be unreliable, but it came from someone Painter knew had a grudge against D-R and had been "jaded" with his view of D-R in the past. Painter himself told a D-R official, Douglas Rich[14], that one often has to discount statements from Dominski because he was "jaded" based on his own experience with the Company. (Tr. 958-960; R-15).

The foregoing evidence proved, and the ALJ properly found that the sources were so unreliable, this demonstrated "malice, recklessness and consciousness that he lacked any good faith basis for reaching such a conclusion." (ALJ 31 l.7-8).

The statements concerning the workload at Olean were not only completely unreliable, they were shown to be demonstrably false. (ALJ 32-33; Tr. 698). Edward Wilber, the turbo components manufacturing manager at Olean (Tr. 698), testified that Olean's workload was up approximately 1,000 man hours in February 2009 as compared to February 2008. (Tr. 704; R-11). There were no layoffs in April, May or June of 2009. The work was never off in an amount close to 50% all year. The only

[14] Douglas Rich, Director of Operations, Olean, Painted Post and Wellsville facilities.

real reductions in Olean work were in subcontracting work which was pursuant to the previously mentioned flexible manufacturing plan, which had been in place for several years, and previous public disclosures about the same to avoid "major restructuring". The workload was as projected and, thus, as Volpe stated, stable in 2009. (Tr. 705).

The Charging Party's Exceptions regarding this point are unpersuasive. (C.P.E. 6, 7, 8). First, in response to the Charging Party's exception that the ALJ improperly found Painter made a statement about "production" and not "workload" is simply a misrepresentation of the ALJ's decision. (C.P.E. 6). In an aside to his primary finding that Painter made this statement with reckless disregard for its truth – the ALJ *additionally* found that Painter's statement was inaccurate. (ALJ 32 l.35). The ALJ ultimately held regarding the Olean statement that Painter's statement was made with "reckless disregard for the truth." (ALJ p. 33 l. 19). The Charging Party misstates the law when it claims that the Respondent must prove falsity – the Respondent can prove Mr. Painter's actions were made with "reckless disregard for their truth or falsity." (ALJ 33 l.19).[15]

[15] Furthermore, the ALJ never held Painter to a reasonableness standard. (C.P.E. 4). The Charging Party is incorrect in claiming that he did. The ALJ's discussion of what a reasonable person would have done – as opposed to what the reckless Painter did – was merely the first step in the ALJ's multi-page analysis of how improper Painter's statements were. *See*, ALJ 30 l. 20 ("in the first place, a reasonable person would not find that the information he possessed was sufficiently reliable to convey to financial analysts who possessed the power to dramatically affect the value of the Employer's stock"). The ALJ continues his discussion of how reckless Painter was – and how untruthful his explanations for how and why he made this statement about Olean – when he summarizes, "[b]ased on all these varied considerations, I conclude Painter's unsubstantiated claim that production at Olean had declined by half was made with a malicious frame of mind and a clear intent to damage the value of his employer's stock." (ALJ 33). The ALJ's statement about reasonableness was not the ultimate standard to which Painter was held. Furthermore, legions of cases in this area use the

The Charging Party's argument that "workload" had no relation to either "production" or "direct labor hours," and that the ALJ erred by reviewing the actual production to evaluate Painter's statements, is simply ridiculous. As the Charging Party states, the primary definition of workload is "the amount of work" or "the amount of work performed… usually within a specific period." The Respondent proved that the work at Olean was never off in an amount close to 50% all year when comparing any two months from 2008 to 2009. (ALJ 32 l.47). That the ALJ in his decision used an example of the immediate three months prior to Painter's statement is merely one example of how Painter's admitted estimate was completely off base. (ALJ 32 l. 50).

As for the Charging Party's objections to the Respondent's Exhibit 11, the Charging Party never cross-examined its creator about the inadequacies the Charging Party now claims it has. (Tr. 700, 703). No claim was ever made at the hearing that the spreadsheet "fails to address indirect labor hours, which are also part of the plant's workload" or that indirect labor hours were part of Painter's calculations. (C.P.E. 7, 8). Thus there is no evidence from which the Board could permissibly conclude that the Respondent's evidence is incorrect, and Painter's estimation was.

Lastly, the Charging Party's exception number 7, which also takes exception to the ALJ's finding that Painter's statements were made with a "malicious frame of mind and a clear intent to damage the value of his employer's stock" are inadequate to raise this credibility finding before the Board. (C.P.E. 2, 7). The ALJ's credibility findings as to Painter and his scheme were made throughout the ALJ's decision. (See e.g. ALJ p. 7 fn.13 "This episode in the examination of Painter demonstrates the caution with which

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terminology "reasonable" to describe the opposite of "reckless." Thus the Charging Party's exception #4 should be denied.

his self-serving testimony must be viewed"; p. 8 fn.15; p. 15-16 "None of this is credible and Painter's claims in this regard erode the reliability of any of his remaining accounts concerning the events of this case"; p. 17 l. 1-5; p. 18 l. 33-50; p.19 fn.31; p.31; p.32 l. 29-35). The Charging Party's citation, ALJ p. 32 lines 49-52, p.33, lines 1-18, is based on pages of factual findings regarding Painter's demeanor and credibility. (ALJ p. 31-32). Furthermore, such specific credibility determinations made by the ALJ, who has cited his review of the witnesses demeanor in making his decision (ALJ p. 2, l. 8) should not be overturned by the Board unless they are clearly contrary to a preponderance of all relevant evidence. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951) (Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect). The Charging Party has made no such showing here.

In upholding Painter's suspension and discharge, the Board should deny the Charging Party's exceptions numbered 2, 4-8 and 10.

(d) The ALJ correctly found that Painter's statement: "Mr. Volpe stated in his year end conference call that employment levels would be maintained" was not protected (C.P. E. 9).

The ALJ properly found that Painter's statement regarding the CEO was "malicious." (ALJ 33, l. 50-52). Not only was Painter's statement patently disloyal, justifying termination, its clear implication is untrue. Jefferson Standard, 346 U.S. at 47 ("[t]here is no more elemental cause for discharge of an employee than disloyalty to his employer"). There is essentially no difference between the ALJ's finding that "Painter engaged in a misleading, malicious, and intentionally damaging attack on the veracity of his employer's CEO" and the rule that statements that are "disloyal" or "reckless" or

"maliciously untrue" are unprotected. Valley Hospital Medical Center, supra, 351 NLRB at 1252, citing Emarco, Inc., 284 NLRB 832, 833 (1987) (ALJ 33).

Furthermore, Respondent proved at the hearing that this statement was untrue. First, Painter admitted that he included it to imply that Volpe was being misleading: "We felt that there was layoffs coming and that Mr. Volpe seemed to be saying that work levels was going to be stable, so it was – it seemed to be misleading, the analysts." (Tr. 333:6-10; 567:9-20). Painter, however, admitted that Volpe never made this statement but that Painter had concluded this was a correct summary of Volpe's other statements based on information disseminated from the Company regarding the prior year, 2008. (Tr. 332: 1-13). Painter had listened to conference calls on October 31, 2008, and early February 24, 2009, and, based on his memory, created a statement that was never uttered and attributed it to Volpe. (Tr. 333-336). Painter insisted that these 2008 statements were misrepresentations because they seemed untrue three and six months later – in April 2009. (Tr. 499-500). In fact, Painter admitted that some of the information he was "responding" to in his call to the analysts **was over a year old**. (Tr. 553).

Straining to justify his comment about Volpe at the hearing, Painter testified that he reviewed transcripts of earnings calls long after the fact, to substantiate his statements to the NLRB during its investigation. (GC-43). Volpe quotes that Painter thereafter stated were the basis for his statement concerning "employment levels" do not even reference employment. The first references a "strong revenue year"; the second is that "demand is going to continue to be strong;" the third again references "cash-flow;" and the last states the Company will be able to avoid "large restructuring

type activity." (GC-43). Further, Painter admitted that Volpe's statements were about Dresser-Rand as an entire Company, which, on Painter's estimation was comprised of at least five plants. (Tr. 376-7).

Painter could not clearly testify as to why he made this final statement (Tr. 497), at one point saying he included it because he wanted to say something positive, then finally admitting that his statement was yet another "interpretation" of Volpe's statements. (Tr. 376:20). While claiming at first that all his comments were current and accurate, Painter was forced to admit on cross examination that the information he relied on "might not have been current." (Tr. 443:6).

Lastly, in its brief, the Charging Party does not make any argument as to why this statement should be considered protected. (C.P. memorandum at 14). In upholding Painter's suspension and discharge, the Board should deny the Charging Party's exception numbered 9.

(e) The ALJ's remaining determinations were correct (C.P.E. 1, 3, 5, 10, 11, 12).

The Charging party erroneously argues that the ALJ improperly considered the fact that Painter engaged in anonymous conduct. (C.P.E. 1, 3). The ALJ noted that the fact that Painter's latest round of calls to analysts was anonymous only to demonstrate the first in a number of differences between these calls and the ones he previously made. (ALJ p. 24). The ALJ merely used this as a tool to flesh out Painter's state of mind when he made those calls – a necessary element in determining whether his conduct was protected. (ALJ p. 24 noting that statements made maliciously or recklessly are unprotected). While in some cases, anonymous conduct can be protected, there is nothing about anonymity which automatically cloaks conduct in the

protections of the Act. Texas Instruments, Inc. v. NLRB, 637 F.2d 822 (1st Cir. 1981) (anonymously mailing confidential wage information to union, and recirculating same, is unprotected).

The Charging Party's further exceptions, alleging that the ALJ is unable to consider "tactics" in determining whether Painter engaged in protected activity is unavailing. (C.P.E 3, 5, 10, 11, 12). In the present case, as distinguishable from the case cited by the Charging Party in its memorandum at 14, the ALJ never questioned the efficacy of the tactics chosen by Painter. Allied Aviation Service Co., 248 N.L.R.B. 229, 231 (1980). In fact, there was much evidence that Painter's statements had quite an effect on Company stock. (Supra at Facts Sections (D), (E)).

Furthermore, it is an inherent part of the Jefferson Standard analysis to consider the speaker's purpose, such as achievements at the bargaining table, and whether the statements are made to further that purpose. Jefferson Standard, *supra* at 472. The Charging Party's own case states that communication must be related to a labor dispute. The relevant analysis is that the tactics caused actual harm, not their measure of success at the bargaining table. The ALJ's analysis was focused only on the amount of harm caused, and not the fact that they were ultimately unsuccessful in changing the Company's proposals. (ALJ 36 l.25-30, noting that the timing only worked to enhance the damage caused by the statements).

In upholding Painter's suspension and discharge, the Board should deny the Charging Party's exceptions numbered 1, 3, 5, 10, 11, 12.

3. The ALJ Correctly Found the Employer Was Legally Privileged to Suspend and Discharge Painter For Violation of Its Policies (C.P. E. 9, 13-16).

Painter's misleading and false statements to the analysts, outlined above, were damaging to the Company's business reputation, were patently disloyal, violated Company Policy and were made with an intentional or reckless disregard for the truth. As Respondent demonstrated at the hearing, and as the ALJ found, Painter was discharged for cause and cannot be reinstated. Section 10(c) of the Act prohibits the Board from ordering the reinstatement of any employee "if such individual was suspended or discharged for cause." 29 U.S.C. s 160(c). (ALJ p. 45-6).

In Jefferson Standard, technicians at a television station were involved in a dispute with their employer. They distributed approximately 5,000 handbills over 10 days that attacked the quality of the employer television station's broadcasts and suggested that the employer considered its customers part of a "second-class city." The handbills made no reference to the union, any labor dispute, collective bargaining nor did they ask for help in a labor dispute. They were a "sharp, public disparaging attack upon the quality of the Company's product and its business policies, in a manner reasonably calculated to harm the Company's reputation and reduce its income." 346 U.S. at 471. The Supreme Court held that the employer did not violate federal labor law by firing the employees for disloyalty.

The Court and the Board below highlighted the following relevant factors in concluding the speech was unprotected:

- Comments were made at a critical time when the Company was moving into the television market (from radio). Jefferson Standard, *supra* at 471.
- The Company lost advertising revenue as a result. Id. at 464.
- Employees deliberately tried to alienate customers by impugning the technical quality of the product. Id. at 471-2.

- The speech attacked public relations and finance policies of the employer, which were unrelated to the labor controversy. Id. at 476.
- The employees' purpose (of achieving a concession from the employer) was undisclosed – there was no indication they were trying to secure a benefit for themselves by casting discredit on the employer. Id. at 472.
- Employees were purporting to speak as experts in the interests of consumers and the public at large – not as aggrieved employees. Id. at 472.
- The employees did not indicate that they sought to secure any benefit for themselves, as employees, by casting discredit upon their employer. Id. at 472.
- The employees were not seeking sympathy or help with the dispute. Id. at 476.

Just as in Jefferson Standard, all these elements work to demonstrate Painter's statements were not protected. Painter's comments were made at a critical time to cause maximum harm – approximately two days before the quarterly earnings report was to be issued. The Company proved that Painter's actions caused the Company actual harm, as the stock reacted commensurate with his negative and false comments. Painter deliberately tried to negatively influence D-R stock by untruthfully and recklessly stating orders and production were down, labor unrest was spreading and Volpe's statements could not be trusted. Painter did not attack any of the Company's labor relations policies. Painter's alleged motivation was undisclosed - he never told the stock analysts that his motivation was to embarrass the Company, so that they would reach a settlement or quell the alleged violence or risk of violence. He never said the lives of union and nonunion employees at Painted Post were in the analysts' hands – or anyone else's for that matter. Painter's statements, their truth aside, spoke at best to the potential concerns of shareholders, not employees, and any benefit Painter hoped to gain for unionized employees was left a mystery. Painter wanted to strike out at the

Company – he did not request sympathy or help. In fact, he made no requests whatsoever in his communications with the analysts.

The Board has continued to follow the principles from Jefferson Standard. See Endicott v. NLRB, 453 F.3d 532 (D.C. Cir. 2006) (finding employee's statements about layoffs leaving a void in workforce and that management would put the business "into the dirt" detrimentally disloyal communications, unprotected by NLRA); In re Sprint United Management Co., 339 NLRB 1012 (2003) (holding that employee repeating false rumors of anthrax attack unprotected); American Golf Corp. (Mountain Shadows Golf Resort II), 338 NLRB 581 (2002) (ruling that union's leaflet was unprotected because (1) its purpose of putting pressure on employer was undisclosed, (2) it was an attack on employer, and (3) leaflet made in interest of public, not employees); St. Luke's Episcopal-Presbyterian Hospitals v. NLRB, 269 F.3d 575 (8th Cir. 2001)(sustaining discharge of employee for disparaging statements about quality of care to television reporter despite statements being made in context of union organizing campaign); Montefiore Hospital v. NLRB, 621 F.2d 510 (2d Cir. 1980)(finding doctors on picket line lawfully discharged for urging patients to go elsewhere because they purportedly could not obtain competent treatment at struck hospital); Keosaian v. NLRB, 630 F.2d 26 (1st Cir. 1980) (holding that employee impersonating the employer's attorney in conversations with its service providers was not protected); Firehouse Restaurant, 220 NLRB 818, 824–825 (1975) (affirming ALJ finding that employees engaged in disloyal criticism of quality of food served in employer's restaurant); American Arbitration Assn., 233 NLRB 71 (1977) (ruling that letter to employer's clients which disparaged

employer's business operation was unprotected disloyal attack).[16] The Board should, like the ALJ did, follow this authority and dismiss the allegation that Painter's conduct was protected by the Act.

Indeed, Painter's disloyal and disparaging statements to the analysts in this case were unprotected for the same reasons as the disloyal and disparaging statements made by employees in the above-cited cases. In his remarks to the analysts, Painter did not criticize Dresser-Rand's position toward the Union during negotiations or its management practices. Instead, he directed his false remarks at the Company's purported lack of orders (and its effect on workforce needs) and predicted an inability to reach a labor contract at another facility not represented by his Union. (179, 601-2). They were in fact directed at the ability of the Company's business to succeed, coupled with a personal attack on Volpe and his veracity with the market.

The Charging Party fails to grasp the distinguishing factor between those cases finding disparaging statements by employees unprotected, and those cases finding speech protected by Section 7. It is the difference between truthfully criticizing a Company's labor and employment practices to an audience that matters to the labor dispute versus attacking the Company with falsehoods directed to an audience that does not.

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[16] See also, Sahara Datsun, 278 NLRB 1044 (1986), enforced, 811 F.2d 1317 (9th Cir. 1987)(denying reinstatement to employee who denigrated employer's reputation in remarks to business associate of employer after employee had been discharged; noting that former employee's action "surely would have provided the Respondent with ample 'cause' for discharge if he had been employed" at time of the misconduct); Studio S.J.T., 277 NLRB 1189, 1201 (1985) (finding that employee's post-discharge telephone call to customer attacking employer's personal reputations was "an act of sufficient disloyalty and vindictiveness as to deprive her of the right" to reinstatement and full back pay); NLRB v. Local Union No. 1129, 346 U.S. 464 (1953) (finding that blanketing the city with libelous leaflets not protected by NLRA).

There is also no evidence that the Company took action in retaliation for protected activity. (ALJ 45-46). No evidence was adduced to indicate the Company applied its policies in an unreasonable or overly broad manner to any and all statements to third parties or even stock analysts. Evidence was introduced indicating that the Company was aware Painter had previously contacted stock analysts. Painter had previously made a round of calls in January or February of 2008. (ALJ p. 6-7; Tr. 309:15-20; 385). Testimony was taken regarding the fact that the Company, right up to Volpe himself, was apparently aware that Painter had made calls to analysts before. (ALJ p. 7; Tr. 312: 1-4). Painter was not disciplined over the calls in 2008 or a subsequent call to Bear Sterns also in 2008 or an e-mail regarding the Union's rejection of the final offer. (ALJ p. 7-8, 50; Tr. 316:7-8; 516; GC-18). Furthermore, Painter and Coates were frequently quoted, had letters to the editor published and had their picture appear in newspapers during the labor dispute without facing discipline. (Tr. 516-7). Painter testified that the Company was aware of his prior statements and conduct but he was never disciplined for it. (Tr. 517:16 – 23).

Much was made of a statement CEO Volpe made in March of 2008 allegedly to Painter: "The analysts are not your friends." (ALJ 7, 50 fn. 54). Both Meisner and Painter admit Volpe made the statement after explaining the repeated inquiries he was getting from analysts questioning the reasons behind having manufacturing operations in New York (Tr. 312: 14-19; 773: 1-13) and were directed to the Union, not Painter alone. What this demonstrates, if anything, is that Company officials had no intent to punish Painter for engaging in protected activity. Only when he crossed the line to unprotected activity was he suspended and discharged. (ALJ 50).

Lastly, the Charging Party is incorrect when it argues that the ALJ found Painter was terminated for violation of the Insider Trading Policy. (C.P. memorandum at 15, C.P.E. 15, 16). The ALJ made a specific finding only as to the Code of Conduct. (ALJ 45 n.47). In so holding, the ALJ made no findings regarding whether Painter actually violated the Securities law. Id. Thus, the Charging Party's argument regarding whether Painter actually violated the insider trading policy is inapplicable here. (C.P. memorandum at 15, C.P.E. 15, 16).

In upholding Painter's suspension and discharge, the Board should deny the Charging Party's exceptions numbered 9 and 13 - 16 and adhere to the ruling of the ALJ.

B. THE ALJ ERRED IN CONCLUDING THAT THE EMPLOYER UNLAWFULLY INTERROGATED EMPLOYEES. (Respondent's Exceptions #16-23).

1. The Inquiries Were Calculated to Elicit Lawful and Necessary Information.

The record shows that the Company's investigation was reasonable in the circumstances, and was necessary to determine the scope of the offending activities and whether they were protected or concerted. Contrary to the ALJ's conclusions, the inquiries were carefully conducted and limited to appropriate information for lawful purposes.

The principal test for determining whether an interrogation violates Section 8(a)(1) is an "all the circumstances" test and one which requires a "reasonable" interpretation: whether, under the circumstances, the interrogation reasonably tended to restrain or interfere with Section 7 rights. Norton Anderbon Hosp., 338 NLRB 320,

320-21 (2002) summarizing Rossmore House, 269 NLRB 1176 aff'd 760 F.2d 1006 (9th Cir. 1985).

The ALJ correctly concluded that most of the inquiries "were directly related to the telephone calls to financial analysts." (ALJ p. 37, l. 48-53).

> "These questions were designed to determine whether the individual employee had made any such calls, participated in any collective decision to make the calls, or had any knowledge regarding the identity of the callers. In addition, questions were posed regarding the evidence relied on by the caller in making the specific recommendations to the analysis. This entire line of questioning is not problematic (ALJ p. 37, l. 53-p. 38, l. 1) (emphasis added).

Thereafter, however, the ALJ examined the remaining questions posed in the interviews – without fully considering their context or purpose – and incorrectly determined that several inquiries "went beyond the permissible bounds" by touching upon "prohibited topics" (ALJ p. 38-39). This is where the ALJ erred.

There is no question that, on April 29, 2009, the Company learned of activities it believed were serious violations of its code of conduct relating to insider trading and/or fair disclosure which necessitated immediate investigation.[17] It is equally clear that the Company could not determine – without investigation – who was engaging in this activity, how frequently, and how far it went. Further, it had no way to determine whether the conduct was part of a group endeavor or whether it was engaged in alone; whether it was authorized by others; whether it was part of an ongoing concerted effort, or a lone rogue employee.

[17] Further, the conduct at issue plainly implicated federal securities law concerning market disclosures, which triggered investigatory obligations on the Company's part. (ALJ p. 52-4).

The ALJ's decision now validates all these concerns. The ALJ, in finding later on in his decision that the Company did not violate the Weingarten rights of its employees, stated that the Company's rationale for its simultaneous, carefully orchestrated interviews was both "legitimate and substantial." (ALJ 43: 19-20 citing Board precedent holding that "the employer's substantial need to protect witnesses, prevent destruction of evidence, and preclude fabrication of testimony justified the resulting infringement on the rights of the employees"). The ALJ specifically found, with regard to the present situation, that "the Employer[] [had a] legitimate need to conduct simultaneous interviews." (ALJ 44: 24). Furthermore, the ALJ found both Painter and the Union's President, Steve Coates, "unavailable" to serve as Weingarten representatives because of the unknown extent of the potential conspiracy:

> Again, it must be recalled that the Company knew to a certainty that he [Painter] had made unprotected and damaging contact with the analysts. Other interviewees, all of whom were innocent of the misconduct under scrutiny, would surely be loath to discuss any matter involving Painter while in his presence. It is easy to imagine the impact of Painter's presence in the interview room when one of his coworkers was asked about whether the Union had authorized anyone to contact financial analysts in the past. [FN 44: This is not a theoretical point. One of the questions contained in the interview script was, "Is there an officer in IUE Local 313 who is responsible for speaking to . . . securities analysts regarding matters of interest to the Union?" (GC Exh. 32, p. 4.) Of course, the correct answer to this query is that Painter had been the one individual so authorized in the past.] I have no doubt that his presence as representative would have impeded the Employer's investigation to the degree that it rendered him "unavailable" to serve as such a representative within the meaning of the Board's precedents regarding unavailability. [FN 45: While Coates was an innocent party, the Employer acted reasonably in concluding that the likelihood of his involvement as a coconspirator was sufficiently great so as

> to render him unavailable for service as a representative in this investigation.]

(ALJ 44: 26-35, including footnotes 44 and 45).

Nor could the Company determine whether all or part of the activity would come within the Act's protection until it ascertained its scope, purpose, or authorization by others. (For example the Board's holding in Meyers II[18] asks the employer to determine, when addressing the concerted status of activities, whether a single employee has "enlisted" the support of others, or whether its "object" was "group action"). Although the day before, the Company had watched its stock careen on an almost unprecedented volume of activity, it still did not know "who" constituted the complement of actors, and whether or not they purported to act on behalf of the Local 313 or the International Union -- either with its actual imprimatur or with its knowledge and tacit approval; whether they had a good faith basis for the misrepresentations that were made; and whether the statements were part of a process that "vetted" them, or were merely ad hoc assertions.

The uncontroverted evidence shows that the Company carefully designed and focused the investigation with the sole purpose of making these determinations (GC Ex. 31; Tr. 784, 831).

First, the evidence shows that, despite the need for swift action, the Company gave forethought and special care as to how this unique investigation would be conducted, to assure uniformity and fairness to all 8 interviewees. (Tr. 782-6 Rather than rely on lower level supervisors, the Company assigned seasoned managers, based on their experience; it gave each investigator a note-taker; most significantly, it

[18] 281 NLRB 882 (1986)

wrote a detailed script with careful instructions for each investigator to follow (GC Exh. 32). Indeed, the evidence shows that the assigned interrogators followed the script closely, and that all interviews used the identical script (GC Exhs. 32-33a and 35-42).

The script contained key limits on the inquiries and safeguards for employee rights: it instructed each interviewer to ***"make clear we are not interested in hearing about union negotiation strategy"*** (GC Exh. 32 p. 6, emphasis added, italics in original). It advised each interviewee, at the outset, that the sole purpose was "to ask you some questions regarding the recent disclosures to securities analysts of misleading information relating to the Company made by a person who said he was a representative of our employees" (GC Exh. 32 p. 1). The script and investigation further assured that a union-designated shop steward was available on request for every interview (id) (ALJ p. 39: "There is no dispute that the Employer made arrangements for every union member who was interviewed on April 30 to have the assistance of a union representative during their interview."). It reminded each interviewee of the specific matters at issue under the Company Code of Conduct and gave each interviewee a copy (id, p. 2). To assure uniform questioning and note-taking, it left space to record each response next to each question (GC Exhs. 32-33a and 35-42). Importantly, it instructed every investigator to advise the interviewee that he would not be retaliated against for revealing misconduct, and gave each a copy of the Company's no-retaliation policy (id., p. 2). Where an employer makes reasonable efforts to circumscribe questioning to avoid unnecessary prying into protected activity or views, an interrogation is not unlawful. Bridgestone Firestone South Carolina, 350 NLRB 526 (2007).

Second, as demonstrated below, each of the inquiries, when viewed in its proper context and in light of its purpose, was lawful and necessary. Each was calculated to determine: (a) the scope of the injurious communications to analysts that the Company believed – and the ALJ held – were unprotected, and potentially unlawful; (b) whether they were part of a design or scheme in which others participated; (c) whether they were "concerted" activities authorized or condoned by others; or (d) whether they were potentially within the umbrella of protected status.

The ALJ cites only four specific inquiries (among more than 50 questions asked) that he regarded as improper (ALJ p. 38), which we review below.

A. "questions regarding internal union procedures and policies":

   (1) "procedures 'employed by IUE Local 313 prior to permitting a communication to go out to the press, public or a securities analyst' (GC Exh. 32 p. 4)";

   (2) "the Employer sought to learn whether the local union contacted the international union prior to communicating with outside entities." (ALJ p. 38, l. 19-23); and

B. "events at the negotiating session on April 8":

   (1) "whether there was 'a discussion of the public reaction the Union should have in response to the Company's change [in negotiating position on April 28]' (GC Exh. 32 p. 6)";

   (2) "Did the union bargaining committee make plans to provide information to the press, public and/or securities analysts relating to the Company's changes? What was that Plan? (GC Exh. 32 p. 6)." (ALJ p. 38, l. 27-32)

The first pair of challenged questions goes directly to (i) whether the offending communications were "authorized," or vetted under an existing union process or procedure, and (ii) whether they were made in "good faith." Both inquiries are calculated to discern any potentially concerted or protected aspects of the

communications. This is supported by the Union's own (and first) witness, Dr. Daley, who specifically asserted that it was his understanding that communications with analysts (and the general public) were lawful if they were truthful and made in good faith:

> "We never, ever, ever lie. I mean this is – and this is – I mean you always produce the truth, you always give facts and you always have a good faith effort to achieve factuality." (Tr. 48)[19]

The Company's straightforward inquiry (with no follow-up questions) into the union's "normal practice" of vetting or reviewing outside communications is simply calculated to determine whether Painter's communications were within, or outside, the union's normal process; and thus whether the statements were approved or orchestrated, or subjected to any other good faith review by others. This inquiry did not probe beyond the surface; it was a necessary to determine only if some vetting or approval procedure applied to these statements or similar types of statements to outside entities. In fact, the evidence shows that there was such a process, and it was not followed in this instance. (Tr. 274-75, 33, 46-48, 56-57 and Tr. 268). Mr. Painter's statements were clearly not otherwise protected. (ALJ 36). It did not impinge on any union activity. See Ogihara AM. Corp., 347 NLRB 110 (2006) citing HCA/Portsmouth Regional Hosp., 316 NLRB 919, 931 (1995) (interrogation did not violate the act where "the conduct about which the interrogation took place was not protected").

[19] Dr. Daley testified that the Union vetted its public statements for accuracy and "good faith" (Tr. 34-35) and always checked with a lawyer before any such disclosure (Tr. 32, 41). So, by this testimony, it is acceptable for the Union to reveal at hearing – a year after the controversy – a part of its diligence around public statements, but it was somehow unlawful for the Company to seek such information in the throes of an investigation that reasonably related to Union public statements.

The second pair of questions, in context, refers to whether the inappropriate communications to financial analysts were part of a concerted response to the Company's change in negotiating position the previous day. As we know, the Painter voicemail began with identifying himself (inaccurately) as a representative of Dresser Rand's employees at the three plants he refers to, and then advised that the negotiation had "taken a turn for the worst." Dresser Rand's inquiries simply sought to determine whether this was part of a planned concerted response, or a purely individual reaction to the negotiating session. Notably, each investigator was instructed to advise the interviewees that the Employer was not interested in uncovering negotiating strategy (GC Exh. 32 p. 6). The purpose of the question as to whether there was a discussion about how the union should publicly respond to the Company's proposal was entirely proper; the Company was not probing negotiating strategy or inner workings, it was trying to determine whether there was a planned concerted response, or whether Painter's acts were made with individual spite and malice.

In light of the caveat that the Company was not asking for anything related to negotiating strategy, all that is left for this inquiry to determine is whether Painter's activities were orchestrated or rogue. This goes directly to the question of whether they were "concerted" activities – a matter that the Company had to, but could not assess without more information. The ALJ specifically found that the employer's suspicions regarding Painter's potential co-conspirators was reasonable. (ALJ 44 at footnote 45).

In this regard, it is noteworthy that no employee supplied any response that revealed any inner workings, processes, or strategies of any kind related to the union or negotiations (see notes on page 6 of GC Exhs. 32-33a and 35-42) – even though, as

the ALJ implied, this was information the employer should not have been prevented from soliciting by having Painter there intimdating other employees. (ALJ 44 at line 28-9 "[o]ther interviewees… would surely be loath to discuss any matter involving Painter while in his presence."). Further, no employer complained to their representative about the content of the inquiries (Tr. 279-80). Therefore, there is no evidence that any employee was actually intimidated threatened or coerced into any disclosure of the type assailed by the ALJ. This glaring absence is powerful proof that the inquiries, even if, arguendo, they were inartfully drafted, overbroad or imprecise, never actually intimidated even one of the eight interviewees. That absence, of course, bears vitally on whether the inquiries can properly be construed as having "reasonably tended" to coerce or intimidate employees in the exercise of protected rights. Certainly, none of the eight responded as if they did (GC Exhs. 32-33a and 35-42).

2. The Manner in Which the Inquiries Were Conducted Tended to Minimize, Not Aggravate, Any Risk of "Coercion".

The ALJ further erred by penalizing the Company for conducting these inquiries with unusual procedures designed to provide special care *despite* lauding these procedures elsewhere in his decision. (ALJ 38, l. 46 - p.39, l. 8; ALJ 43-4).

It is true that these inquiries were more carefully planned, supervised, and executed than a run of the mill plant offense. But it is equally true that the conduct under investigation was most unusual and its perceived damage more profound than ordinary workplace offences; and there is no suggestion in Board law that an employer's response should not be equal to the extraordinary issues presented. (ALJ 43-4).

The ALJ erred by failing to recognize that the planned and unusual manner in which the investigation was conducted provided special care and safeguards against any risk of coercion or intimidation.

Here, a 12-page script was provided and adhered to. All the interviews followed it (GC Exhs. 32-33a and 35-42). The Employer took care to select some of its most experienced personnel, and to provide them with a silent onlooker to take notes. The employees were immediately offered representation by available stewards (ALJ p. 39). They were specifically advised that they would not be retaliated against. The script provides:

> "Further, I want to make sure that you clearly understand that the Company prohibits retaliation against employees who report wrongdoing. I am handing you that policy as well." (GC Exh. 32 p. 2)

The caveat not to disclose union negotiating strategy was written directly into the script with the intent that it govern the extent of the inquiry and be recited to each interviewee. The subject matter under discussion was specifically and plainly identified at the outset, and a document concerning that subject was given. The interviews were conducted as simultaneously as possible, and away from the shop floor where there were quiet enclosed rooms available.

These safeguards reflect care, not "coercion." The employer should not be penalized for creating more careful procedures, writing in more safeguards, telling employees of the serious matters involved, and using more skilled personnel in this unusual instance, than in other more pedestrian matters. Yet that is precisely what the ALJ appears to do (see ALJ p. 39, referring negatively to the warnings in the script, the

higher level Company personnel used in the interviews, the location and "the use of a written script was a dramatic illustration of the seriousness of the situation.")

If anything, these were safeguards and measures showing care and forethought that were equal to the unusual importance of the matter at hand. They should be regarded as diminishing any risk of impropriety, not heightening it. If the Board were to adopt the ALJ's logic on this point, Employers would be discouraged from using experienced personnel, quiet rooms, advising employees of the stakes involved, and using carefully scripted questions in their investigations, since these would apparently be viewed as "heightening the coercive atmosphere" (ALJ p. 39, l. 7).

Indeed, the ALJ showed his own confusion on this issue because he ultimately contradicted himself, holding that, "to be clear, I am not suggesting that the manner of interrogation would have been unlawful if the content had been appropriately limited." (GC p. 39 l. 10-12) (emphasis added).

Here, viewed in context, the inquiries were appropriately limited, did not actually intimidate or coerce any of the interviewees, and cannot reasonably be regarded as having tended to do so; and the unusual care that went into the script, selection of interviewers, caveats contained in the interviews, and overall manner in which the interviews were conducted were properly designed to match the seriousness of the issues at hand, (as recognized by the ALJ),while imposing safeguards to minimize any risk of over-reaching.

CONCLUSION

For all these reasons, the Respondent's Cross-Exceptions should be accepted; the finding that the Respondent unlawfully interrogated employees should be vacated;

the Charging Party's exceptions should be denied consistent with the ALJ's ruling and for the additional reckless and malicious statements Painter made, and Mr. Painter's suspension and discharge should be upheld.

Dated: April 29, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Respondent's Cross-Exceptions and Brief In Support of Its Cross-Exceptions and In Opposition to the Charging Party's Exceptions have been served electronically on this date, at the email addresses indicated below, upon

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